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1999

# Marion Montoya v. Utah Department of Health Division of Health Care Financing : Brief of Petitioner

Utah Court of Appeals

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Jean P. Hendrickson; Assistant Attorney General; Carlyle Odendahl; Utah Department of Health.  
David L. Grindstaff.

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IN THE UTAH COURT OF APPEALS

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MARION MONTOYA, )

Petitioner, )

vs. )

UTAH DEPARTMENT OF )  
HEALTH DIVISION OF HEALTH )  
CARE FINANCING, )

Respondent.

CA No. 990657  
Case No: 98-288-98  
Priority No. 14

---

BRIEF OF PETITIONER

---

APPEAL FROM A FINDING THE UTAH DEPARTMENT OF HEALTH

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	)	CA No. 990657
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HEALTH DIVISION OF	)	Priority No. 14
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BRIEF OF PETITIONER

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APPEAL FROM A FINDING THE UTAH DEPARTMENT OF HEALTH

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JURISDICTION OF THE COURT AND  
AND NATURE OF THE PROCEEDINGS

This is a Petition for Review from a finding and recommendation that the Department of Health place Appellant's name on the State Nurse Aid Registry for physical and mental abuse. This court has jurisdiction to consider the appellant's petition pursuant to Utah Code Annot. § 78-2a-3(2)(a).

ISSUES PRESENTED ON APPEAL AND  
STANDARD OF REVIEW

Whether two cases were improperly combined into a single case and improperly used to prejudice the other case. An "agency's application of the law to the facts may, depending on the issue, be reviewed . . . 'with varying degrees of strictness, falling anywhere between a review for "correctness" and a broad "abuse of discretion" standard.'" Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997) (citation omitted). Additionally, appellate courts should "take[] into account factors such as policy concerns and an agency's expertise." Id. at 181 n.6.

#### CONSTITUTIONAL PROVISIONS STATUTES, AND ORDINANCES

##### NECESSARY FOR A DETERMINATION

Rule §410-14 of the Utah Department of Health and the Utah Administrative Hearing Procedures Act, Title 63, Chapter 46b, Utah Code Annotated, 1953, as amended.

#### STATEMENT OF THE CASE

##### A. Nature of the Case

This is a petition for review of a formal hearing held by the Department of Health finding that Petitioner committed physical and mental abuse against two patients.

##### B. Statement of the Facts

After an administration hearing, Findings of Fact were made that the Petitioner committed physical abuse and mental abuse by intentionally pushing hard on a patient's right shoulder causing that patient to be shoved into the railing and mentally abusing another patient by humiliating that patient with repeated demands for the patient to roll over and simultaneously telling the patient that he was not even trying.

Petitioner was charged with abuse against Montez Black relating to an alleged incident which occurred on or about August 9, 1998.

Another charged incident was alleged to have occurred on or about August 8, 1998 involving a Marvin Waldo.

Petitioner denied mental or physical abuse of either patient.

#### SUMMARY OF THE ARGUMENT

Petitioner was unfairly prejudiced by separate allegations presented in the same case. The allegations as found would not be sufficient to meet the definition of abuse.

#### ARGUMENTS

##### I. THE TWO CASES WERE IMPROPERLY COMBINED INTO A SINGLE CASE



AND IMPROPERLY USED TO PREJUDICE THE OTHER CASE.

Petitioner was unfairly charged in the same case by a complaint which combined two complaints by multiple accusers unrelated by the facts or offenses.

Petitioner was charged with abuse against Montez Black relating to an alleged incident which occurred on or about August 9, 1998.

Another charged incident was alleged to have occurred on or about August 8, 1998 involving a Marvin Waldo.

The charges arose out of allegedly different victims with different fact patterns. There was no allegation that the two complaints were part of a common scheme or plan. Petitioner alleges that it, "is a clear abuse of discretion in that it sacrifices the [petitioner's] right to a fundamentally fair [hearing]. State v. Scales, 946 P.2d 377, 384 (Utah Ct.App. 1997) (quoting State v. Pierre, 572 P.2d 1338, 1350 (Utah 1997)).

An example of how this unfairly prejudiced Petitioner was by the combining of these two charges, during the closing argument of Diane Frank representing the Department of Health,

she argued that "we have heard about not only one but two incidents of abuse that took place on the same weekend." Transcript at page 168. The Petitioner testified that she has been a Certified Nurse's Aid for approximately eleven years. The Department of Health was unfairly allowed to impermissibly buttress the second complaint with the first complaint and vice-versa.

The effect on the trier of fact and prejudice was admitted in the Administrative Law Judge's decision when he states when discussing the Black incident and the Petitioner's intent, "but this is an administrative hearing without a jury and the presiding officer finds it relevant to Ms. Mantas apparent intent, especially in light of the hearing record as a whole, including the incident against M.W." Final Agency Order at page 7. Therefore, the Administrative Law Judge used the Waldo facts to erroneously buttress the Black facts and vice versa in each case to unfairly mold his decision.

II. THE EVIDENCE INTRODUCED AT THE HEARING IS INSUFFICIENT  
TO SUSTAIN THE FINDING

To support a finding that a petitioner committed abuse,

findings must be made that Petitioner abused the patient by the willful infliction. Here, in order to find that Petitioner abused Montez Black evidence must establish that Petitioner "willfully inflicted injury." The mere finding that Petitioner pushed hard on Black's right shoulder causing Black to be shoved into the bed must be coupled with a finding that Petitioner had a mental state to willfully inflict injury. The Administration Law Judge states that reckless indifference to the natural consequences of ones action may be defined as willful. Petitioner asserts that the reckless disregard standard would require Petitioner to act with respect to circumstances surrounding her conduct or the result of her conduct such that she is aware of but consciously disregards a substantial and unjustifiable risk that the material element exists or will result from her conduct. Further that this risk must be of such and nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the petitioner's standpoint. See Utah Code Annot. § 76-2-103(3). The undisputed evidence was that Montez Black was an extremely large woman who often fought with those who cared

for her and that it was necessary to turn her to change her sheets. Using this standard there is insufficient evidence to conclude that Petitioner acted willfully but rather acted to change the bed with another CNA available to catch Montez Black on the other side of the bed.

Regarding the second incident, Petitioner asserts that mental abuse consisting of humiliation could not have occurred even if the oral statements as alleged were truthful. The command, "roll over, roll over," is not humiliating to any degree. Her later assertion, "oh come on, you are not even trying, come on" cannot be interpreted as humiliating as she is stating her opinion of his effort. Her later retort, "I am not hurting you" is directed by the Petitioner to the Patient to state her interpretation of her actions. Assuming each statement was made as reported, Petitioner asserts that this does not constitute mental abuse. No degrading remarks are willfully made to disparage the patient.

#### CONCLUSION

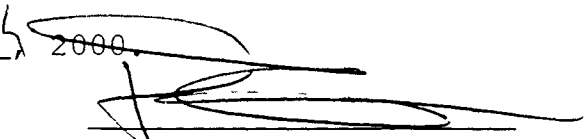
Based on the foregoing, the action of the Department of

Health is an abuse of discretion.

ADDENDUM

An addendum is not necessary to this brief.

DATED this 6<sup>th</sup> day of March, 2000.


  
\_\_\_\_\_  
David Grindstaff  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of March, 2000, a true and correct copy of the foregoing Brief was mailed, first class postage thereon prepaid, to:

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